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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Inhale Therapeutic Systems, Inc.

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Serial No. 76/040,782

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Bruce W. Schwab and Mary L. Shapiro of Townsend and Townsend and Crew, LLP for Inhale Therapeutic Systems, Inc.

Verna Beth Ririe, Trademark Examining Attorney, Law Office 105 (Thomas G. Howell, Managing Attorney).

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Before Hanak, Hohein and Rogers,
Administrative Trademark Judges.

Opinion by Rogers, Administrative Trademark Judge:

Inhale Therapeutic Systems, Inc. has filed an application to register SOLO as a trademark for goods in Class 10 identified as "medical apparatus in the nature of a hand-held unit for aerosol drug delivery to the deep lung of large and small molecule drugs as fine, dry particles."[1]

[1] Serial No. 76/040,782, filed May 3, 2000, based on applicant's allegation of a bona fide intention to use the mark on or in connection with the goods in commerce.

The trademark examining attorney has finally refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d). The basis for the refusal is that the mark SOLO has already been registered for "positive airway breathing devices," also in Class 10[2], so that when applicant's mark is used on or in connection with the identified goods, it would be likely to cause confusion or mistake by consumers, or to deceive consumers as to the source of applicant's and registrant's respective goods.

When the refusal was made final, applicant appealed. Applicant and the examining attorney filed briefs; an oral hearing was not requested. We affirm the refusal.

Our determination under Section 2(d) is based on analysis of all of the probative facts in evidence that are relevant to factors bearing on the issue of likelihood of confusion. In re E. I. du Pont de Nemours and Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In particular, in this case, because the respective marks are identical[3], we

[2] Registration No. 2,175,252, issued July 21, 1998, to Respironics, Inc.

[3] The marks are identical in sound and appearance and are likely to create the same commercial impression on consumers. In fact, in arguing that SOLO "is highly suggestive and, hence, warrants a more limited scope of protection," applicant essentially asserts that the marks share the same commercial impression. The identical nature of the marks is a fact that "weighs heavily against applicant." In re Martin's Famous Pastry Shoppe, Inc., 748 F2d 1565, 223 USPQ 1289, 1290 (Fed. Cir. 1984).

focus on the cumulative similarities or differences in the the goods and the classes of consumers of the involved goods. Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

We turn, first, to the goods. When marks are the same, or even nearly so, "it is only necessary that there be a viable relationship between the goods or services in order to support a holding of likelihood of confusion." In re Concordia International Forwarding Corp., 222 USPQ 355, 356 (TTAB 1983). The likelihood of confusion analysis, in regard to the relatedness of applicant's and registrant's goods, must be determined on the basis of the goods as they are identified in the application and registration. Canadian Imperial Bank v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987). Since neither identification is restricted in any way as to channels of trade or classes of consumers, the Board must assume that the goods could be offered through all normal channels of trade and to the usual classes of consumers for such goods. *Id.*

Moreover, apart from the presumptions we must make based on the identifications, there are numerous items in the record which demonstrate that goods such as applicant’s and registrant’s can emanate from the same source and have

been distributed in the same channels of trade. In regard to the goods being of the type that would emanate from the same source, see Registration Nos. 2,085,547 and 1,745,662, attached to the examining attorney's final refusal of registration.[4] See also, the reprints of registrant's web pages attached to the first office action, which show that registrant, besides being the source of its identified goods, is also a source of various products for "taking aerosol medication." In regard to the involved goods being the type that would move in the same channels of trade, see the Apria Healthcare web page (www.apria.com), as well as the Medque and OUCmedical web pages (www.medque.com and www.oucmedical.com), all included with the final refusal of registration; and the photocopies from the catalog of the

[4] The '547 registration, for the mark HELPING THE WORLD BREATHE EASIER, includes goods identified as "…continuous positive airway pressure (CPAP) respiratory therapy apparatus, medical aspirators, and medical nebulizers." The '662 registration, for the mark DEVILBISS, includes goods identified as "…air driven medication nebulizers… medication atomizers… and continuous positive airway pressure (CPAP) respiratory therapy systems…." Although these registrations are not evidence that the marks shown therein are in use or that the public is familiar with them, they nevertheless have some probative value to the extent that they serve to suggest that the goods listed therein (which are the same types of goods involved here) are of a kind which may emanate from a single source. In re Azteca Restaurant Enterprises Inc., 50 USPQ2d 1209, 1211 (TTAB 1999). *See also*, In re Albert Trostel & Sons Co., 29 USPQ2d 1783, 1785-86 (TTAB 1993), and In re Mucky Duck Mustard Co. Inc., 6 USPQ2d 1467, 1470 at n. 6 (TTAB 1988).

St. Louis Medical Supply company, also included with the final refusal.

Applicant argues that its products are not a simple nebulizer or other previously available means for delivering medication by aerosol spray or through inhalation therapy, i.e., "are not in any sense a conventional inhaler" but "are complex devices that facilitate the delivery of advanced pharmaceuticals, such as insulin, through inhalation rather than by injection, transdermal or oral methods of delivery." Brief, p. 4. We note, however, that even if this is so, applicant's identification of goods must be read to cover nebulizers and existing inhalation therapy products, as well as its apparently newer "complex devices."

In regard to classes of consumers, there are no restrictions in either identification, so we must assume that the respective products can be sold to, among others, distributors of health-care products, health care providers and at retail, i.e., that each party may market its product directly to end users.[5] Even if we restrict our focus to

[5] Neither identification contains a distribution restriction, e.g., a restriction indicating that the product is distributed solely by prescription, and so we must be equally concerned with "over-the-counter" distribution directly to retail customers. *See* Pennwalt Corporation v. Center Laboratories, Inc., 524 F.2d 235, 187 USPQ 599, 601 (CCPA 1975), wherein the Court was equally concerned with appellant's over-the-counter drugs and the fact

sales to distributors of health-care products, or to health care providers who would then decide what products are appropriate for individual patients, we believe confusion as to source or sponsorship is likely when the marks are identical and the respective goods would be expected to emanate from the same source. Further, end users of the respective products would be even more prone to confusion, as they would not necessarily be privy to methods of distribution of health-care products.

Applicant argues that registrant's goods are not delivery systems for medication and are used only by individuals suffering from sleep apnea. In addition, applicant maintains that its goods are not directed to those in need of any sort of respiratory therapy product at all but, rather, are directed to those who can benefit from rapid infusion of medication. Specifically, applicant notes that its product is now being used for delivery of insulin to treat diabetes, interferon-beta to treat a form of multiple sclerosis, and alpha-1 proteinase inhibitor to treat emphysema, and that there are plans for using the product to deliver other drugs, for other conditions.

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that prescription drugs would be encompassed by the identification in its registration. *See also,* Miles Laboratories, Inc. v. Whorton Pharmacal Company, 199 USPQ 758, 760 (TTAB 1978), and Meyer Laboratories, Inc. v. Diurcap Corporation, 163 USPQ 595, 596-97 (TTAB 1969).

Brief, p. 4. Further, applicant argues that these are the types of products that would only be utilized following consultation with health-care providers.

Even if we were to consider the respective products as being used only in the manner argued by applicant, there is nothing in the record to suggest that individuals suffering from sleep apnea, or any other condition that might require use of a product such as registrant's, might not also be suffering from diabetes, or multiple sclerosis, or emphysema. Further, even if we assume that an individual suffering from both sleep apnea (and using registrant's product) and one of the other diseases which can be treated by medication delivered through applicant's product would only have both products prescribed or recommended by a health-care provider, we cannot assume first, that such provider would surely know the products emanated from unrelated entities and, second, would take the time to explain that the products had different sources, despite their identical marks.

Considering the identical nature of the marks, the relatedness of the goods in terms of their likelihood to emanate from the same source and be distributed in the same channels of trade, and the presumptive overlap in classes of consumers, we find that confusion is likely. Finally,

if we had any doubt on the issue, we would have to resolve that doubt in favor of the prior user and registrant. Kenner Parker Toys v. Rose Art Industries, 963 F.2d 350, 22 USPQ2d 1453, 1458 (Fed. Cir. 1992).

Decision: The refusal of registration is affirmed.